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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. KENNETH PURDY SMITH, Defendant and Appellant.	2d Crim. No. B169839 (Super. Ct. No. SM77799) (Santa Barbara County)

Kenneth Purdy Smith appeals from the order of the trial court recommitting him to the California Department of Mental Health for treatment after a jury determined him to be a mentally disordered offender (MDO). (Pen. Code, § 2960 et seq.)[1] Smith contends the court abused its discretion by requiring him to be shackled during trial and by failing to consider outpatient placement. Although we agree that shackling Smith was not justified, we conclude there was no prejudice because the jury did not see the restraints. Accordingly, we affirm.

Facts

Smith was committed to Patton State Hospital after violating his parole by committing assault with a deadly weapon in 1992. He has been in psychiatric hospitals since 1995. Previously, Smith has been convicted of battery of a police officer, assault

[1] All statutory references are to the Penal Code unless otherwise stated.

with a deadly weapon, obstructing/resisting an executive officer, and drunk driving. In addition, he has an extensive history of illicit drug and alcohol abuse. He currently suffers from schizoaffective disorder, a severe mental disorder marked by paranoia.

One of Smith's psychiatrists, Dr. Anca Chiritescu, testified that in the two months prior to the hearing, he observed Smith act out his paranoid ideations. Smith "has been on the verge of attacking staff members [of the hospital]." Doctor Chiritescu testified that Smith has needed a show of force by many staff members, supplemental medication, and a "safe place" to calm him down on different occasions within several months of the hearing. Accordingly, Dr. Chiritescu testified that Smith represents a substantial danger of physical harm to others.

Smith's primary psychotherapist, Valerie Evans, testified that he told her he would love to kill someone, that he really wants to hurt someone, and that he was afraid of what he might do. Evans stated that Smith has committed numerous rule violations and needed extra medication to calm him down on several occasions.

Doctor Robert Beilin, a representative from the Forensic Conditional Release Program (CONREP), interviewed Smith twice before the hearing and testified that Smith is not ready to be released into the community because he continues to be paranoid. Doctor Beilin testified that Smith believes other patients and staff are "plotting against him" and the United States is a dictatorship. Doctor Beilin also testified that Smith has been threatening to the hospital staff and its patients, stating that he would "like to kill someone."

In addition to his usual daily regimen of psychotropic medications, during the preceding year Smith has needed additional medicine to calm him down when he was out of control. Smith has failed to attend mandatory drug and alcohol programs, even though he was directed to do so. Doctor Beilin believed he is unlikely to take his medications unless he is supervised. Because of head injuries Smith has sustained, Smith would have difficulty following his elaborate daily medication regimen on his own even if he wanted to, and his condition would likely deteriorate.

After the jury returned a "special verdict," the court ordered recommitment and this appeal ensued.

Discussion

Leg Restraints

Smith contends the court abused its discretion by requiring him to be placed in hidden leg shackles during trial without a hearing on the issue or evidence that would justify such restraints. Smith contends we should review this assignment of error under rules applicable to criminal trials, even though he concedes that MDO cases are civil matters. Our Supreme Court has not determined what standard of review applies to the shackling of an MDO defendant. In the absence of such guidance, we shall assume that the more stringent standards of criminal law apply.

When a criminal defendant is in shackles during a jury trial, his right to a fair trial is likely to be compromised. (*People v. Duran* (1976) 16 Cal.3d 282, 290-292; accord, *People v. Mar* (2002) 28 Cal.4th 1201, 1216.) Accordingly, a criminal defendant may not be physically restrained in the jury's presence unless he exhibits violent behavior, threatens violence or escape, or a manifest need arises in the courtroom which is a matter of record. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1213, quoting *Duran*, at pp. 290-291; *People v. Seaton* (2001) 26 Cal.4th 598, 652 [charge of violent crime insufficient to support shackling].) We review a trial court's ruling requiring the use of restraints under the abuse of discretion standard. (*Mar*, at p. 1217; *People v. Alvarez* (1996) 14 Cal.4th 155, 192.) A court abuses its discretion if it orders the use of physical restraints on a defendant when it is not manifestly necessary. (*Slaughter*, at p. 1213; *Duran*, at pp. 290-291, 293, fn. 12.)

Trial courts are obligated to independently determine what facts, if any, establish a manifest need to place a defendant in restraints in the courtroom, and to state such facts on the record. (*People v. Mar, supra,* 28 Cal.4th at pp. 1217-1218; *People v. Duran*, *supra*, 16 Cal.3d at p. 293, fn. 12.) In doing so, the court may initiate "'. . . *whatever procedures the court deems sufficient*, . . .'" out of the presence of the jury, to make its due process determination of whether restraints are necessary. (*Mar*, at p.

1217.) No formal hearing is required, but the court may not abdicate its role of determining the facts to security personnel or law enforcement. (*Id*., at pp. 1217-1218.) Nor may it consider rumor or innuendo. (*Id.*, at p. 1218.) The record must show that the court itself ascertained and considered what facts and circumstances exist in the courtroom, concerning defendant's nonconforming conduct, which demonstrate a manifest need to restrain the defendant. (*Ibid*.)

Defense counsel informed the court that sheriff's deputies intended to use a leg restraint on the defendant in the courtroom during trial, and objected to this proposal. The court engaged in a colloquy with counsel on the issue. The prosecution argued that the courtroom was not sufficiently secure because it was not connected to the holding facility, requiring sheriff's deputies to staff the courtroom. Defense counsel responded that the court may not rely on the prosecutor's feelings, or the hospital's opinion, no matter how sincere they may be. The court expressed concern, based on reports from Patton State Hospital, that Smith needs to take daily medications. Defense counsel informed the court that Smith had his medications and was taking them.

Nevertheless, over defense counsel's objection, the court ordered that a leg restraint, not visible to the jury, be placed on Smith in the courtroom during the trial. The court made this decision based only on a statement in a hospital report concerning Smith's need to take daily medication – the medication he was taking regularly. Thus, the decision was founded solely on the request of law enforcement and a hospital report, not on the court's independent evaluation of demonstrable facts in evidence. We conclude it was error to restrain the defendant. (*People v. Mar, supra,* 28 Cal.4th at p. 1218 [re application of *Duran* and citing *People v. Cox* (1991) 53 Cal.3d 618, 651-652, as to use of stun belt].)

Appellant urges this court to adopt a rule that shackling defendants is reversible per se. Our Supreme Court has held to the contrary: "[c]ourtroom shackling, even if error, [is] harmless if there is no evidence that the jury saw the restraints, or that the shackles impaired or prejudiced the defendant's right to testify or participate in his defense." (*People v. Anderson* (2001) 25 Cal.4th 543, 596; *People v. Tuilaepa* (1992) 4

Cal.4th 569, 583-584 [no prejudice if jurors briefly see defendant in shackles]; accord, *People v. Slaughter, supra,* 27 Cal.4th at p. 1213; *People v. Jackson* (1993) 14 Cal.App.4th 1818, 1829 [holding that if jury does not see shackling, the error should be assessed under *People v. Watson* (1956) 46 Cal.2d 818, 836].)

No prejudice arose here because there is no evidence that the jurors saw the restraints. Nor was there any evidence that the restraints impaired defendant or prejudiced his right to testify or participate at trial. Moreover, there is no prejudice under the *Watson* test because the evidence supporting recommitment is overwhelming. Both of Smith's psychiatrists testified that he was dangerous to others and met all the MDO standards, and the psychotherapist from CONREP testified that Smith is not ready to be released because of his recent threatening behavior and his ongoing paranoia.

The Attorney General argues, without authority, there should be a rebuttable presumption that MDO defendants are so dangerous that restraints in the courtroom are presumptively warranted, and that MDO defendants should bear the burden of rebutting the presumption. The contrary is the rule. Using restraints on defendants in the courtroom is presumed error in the absence of specific evidence of an immediate, manifest need for them. Indeed, in *Duran*, defendant was a life-term prisoner charged with assault with a deadly weapon and possession of a dirk or dagger while confined in prison. (*People v. Duran*, *supra*, 16 Cal.3d at p. 286; and see *People v. Seaton*, *supra*, 26 Cal.4th at p. 652.) When it is determined that restraints are necessary, they must be as unobtrusive as possible under the circumstances. (*People v. Mar*, *supra*, 28 Cal.4th at pp. 1216-1217.)

Outpatient Placement

Smith contends the court abused its discretion by failing to consider releasing him on outpatient status pursuant to section 2972, subdivision (d). Section 2972, subdivision (d) states, in pertinent part, "[a] person shall be released on outpatient status if the committing court finds that there is reasonable cause to believe that the committed person can be safely and effectively treated on an outpatient basis." But, section 2972, subdivision (c) provides, in pertinent part, "[i]f the court or jury finds that

the patient has a severe mental disorder, that the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, and that by reason of his or her severe mental disorder, the patient represents a substantial danger of physical harm to others, the court shall order the patient recommitted . . . or recommitted to the outpatient program in which he or she was being treated . . . ."

Smith was not being treated in an outpatient program; he was in Patton. Accordingly, the court ordered Smith recommitted to Patton after the jury found that Smith still met all the MDO criteria. Although the trial court did not expressly consider the option of outpatient status under section 2972, subdivision (d), the determinations made under subdivision (c) obviate the possibility of such placement. Furthermore, the record does not show there is reasonable cause to believe Smith can safely and effectively be treated on an outpatient basis.

Smith asserts that the trial judge was unaware that he had the discretion to consider outpatient placement. Assuming that Smith did not waive this issue by failing to object to recommitment at Patton, the record establishes that Judge Staffel was well aware of his discretion to order outpatient status for Smith. Both parties refer to Judge Staffel's rulings after the 1999 and 2000 MDO commitment proceedings concerning Smith, which are part of this record. In those cases, Judge Staffel expressly found that Smith's release under section 2972, subdivision (d) was not appropriate and that a confined setting was required to keep him from being a danger to others. The record establishes that the trial judge was well aware of his discretion to order outpatient placement.

In this proceeding, expert testimony and a letter from Patton establish that even with intensive intervention and assistance, Smith would not be able to function as an outpatient at this time. There is no requirement that the court make an express statement that outpatient treatment is inappropriate. We presume that the court considered the evidence and determined that outpatient status is inappropriate. (Evid. Code, § 664; see generally *People v. Young* (1991) 228 Cal.App.3d 171, 186.)

The judgment is affirmed.

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PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

Timothy J. Staffel, Judge

Superior Court County of Santa Barbara

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Kenneth N. Sokoler, Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.